

2546
No. 12019

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HARRY C. WESTOVER, United States Collector of
Internal Revenue, Sixth Collection District of Cali-
fornia, and UNITED STATES OF AMERICA,

Appellants,

vs.

AGNES F. SMITH,

Appellee.

TRANSCRIPT OF RECORD

Upon Appeal From the District Court of the United States
for the Southern District of California
Central Division

FILED

OCT 16 1948

PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS:

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For Appellee:

BERT A. LEWIS of

GIBSON, DUNN & CRUTCHER

634 S. Spring Street

Los Angeles 14, Calif. [1*]

In the District Court of the United States in and for the
Southern District of California
Central Division

No. 7476 WM

AGNES F. SMITH,

Plaintiff,

vs.

HARRY C. WESTOVER, United States Collector of
Internal Revenue, Sixth District of California, and
UNITED STATES OF AMERICA,

Defendants.

COMPLAINT TO RECOVER OVERPAYMENT OF FEDERAL INCOME TAX

FIRST CAUSE OF ACTION

Comes now the Plaintiff, Agnes F. Smith, and for her first cause of action herein alleges as follows:

I.

Plaintiff is and has been since May, 1943, a resident of Los Angeles County, California.

II.

In 1933, Plaintiff acquired all of the outstanding capital stock of The Quickwork Company, an Ohio corporation, and continued to own said stock until the liquidation of said corporation during 1940.

III.

The Quickwork Company, above mentioned, immediately prior to its liquidation and for many years prior thereto engaged in the [2] business of the manufacture and sale of certain machine tools consisting principally of various types of rotary shears. It owned patents and

drawings covering the manufacture of such machines and in addition to the manufacture and sale thereof had licensed other companies to manufacture similar machines on a royalty basis.

IV.

Under date of May 31, 1940, The Quickwork Company entered into an agreement for the sale of all of its assets, exclusive of cash in the bank and certain miscellaneous items, to Whiting Corporation, an Illinois corporation. Said agreement provided that the latter corporation should pay as consideration for said property \$15,000 in cash, certain other fixed amounts of a minor nature and 10% of the gross sales price to the Whiting Corporation on all machinery and equipment thereafter developed and manufactured by it as a result of acquiring the machinery, patents and patterns of The Quickwork Company. The obligation to make said payments based on a percentage of sales was to continue in any event until May 31, 1950 and thereafter during the lifetime of Plaintiff Agnes F. Smith who was 57 years old at the date of said agreement. A true and correct copy of said agreement of sale, exclusive of inventory and miscellaneous schedules attached to the original, is attached hereto as Exhibit "A" and is incorporated herein by reference as if fully set forth herein.

V.

The contract of sale between The Quickwork Company and the Whiting Corporation was an arms-length transaction in which each party was interested in making the best bargain possible. The Directors and stockholders of the Whiting Corporation were not related or interested in any way in The Quickwork Company nor was The Quickwork Company, its stockholders, or directors inter-

ested or related in any way to the Whiting Corporation. Plaintiff as the controlling officer and stockholder of The Quickwork Company attempted to secure the [3] best bargain possible for that Company and in connection with such negotiations did not solicit nor receive any advice concerning the tax consequences to The Quickwork Company or herself of the various counter proposals made during said negotiations or the agreement as finally executed. For many years prior to said sale the annual sales of The Quickwork Company had been substantial and both parties to said agreement realized that the impending War would be likely to increase considerably the demand for and sales of The Quickwork line.

VI.

The agreement contained in said contract of sale by the Whiting Corporation to pay the 10% based upon gross sales had a substantial value and the parties to such agreement realized it had a substantial value, but there was no way of ascertaining the measure of said value at the time of said sale, and said agreement then had no ascertainable fair market value.

VII.

Shortly after May 31, 1940 pursuant to the aforesaid agreement The Quickwork Company transferred and delivered by Bill of Sale to the Whiting Corporation complete title to the assets as described in and as required by said agreement of May 31, 1940, and thereupon ceased to have any interest whatsoever in said assets and at no time thereafter has The Quickwork Company or Plaintiff owned or possessed any interest whatsoever with respect to said assets.

VIII.

Shortly after the consummation of the aforesaid contract dated May 31, 1940 The Quickwork Company deter-

mined to liquidate and dissolve, and under date of August 24, 1940 it transferred by a Bill of Sale and Assignment all of its assets of whatsoever nature including its rights against the Whiting Corporation under the agreement of May 31, 1940, to the Plaintiff in complete liquidation and in complete liquidation and cancellation of all of its outstanding [4] stock which was then owned solely by Plaintiff. At said time Plaintiff surrendered her stock for cancellation and retirement and said stock was cancelled and retired and has not since been reissued. In due course thereafter The Quickwork Company was dissolved.

IX.

The stock in The Quickwork Company owned by Plaintiff at the time of said liquidation was held by her at an adjusted basis of \$34,000. She received in the final liquidation with respect thereto assets of a total value of \$39,204.26 exclusive of the right to the percentage payments under the agreement of May 31, 1940. Long term capital gain of \$5,204.26 was reported by Plaintiff in her 1940 Federal Income Tax return and no adjustment in said return was made upon audit by the appropriate Federal Revenue Agent's office. At the time Plaintiff received in liquidation of her stock in The Quickwork Company the contractual right against the Whiting Corporation in the percentage payments to be paid under the contract of May 31, 1940, said contractual right had a very substantial value and Plaintiff realized and acknowledged that it had such a value. There was no way of ascertaining the measure of said value and said contractual right then had no ascertainable fair market value. Because of this no value was assigned to said right in determining the amount of Plaintiff's capital gain upon said liquidation.

X.

Neither in her Federal Income Tax return for 1940 nor in any other way at any time has the Plaintiff represented or implied to anyone that said contract did not have a substantial value at the time of the liquidation of The Quickwork Company. During the year 1940 subsequent to the liquidation, Plaintiff received as percentage payments from the Whiting Corporation under said agreement a total of \$2,583.23. These were reported as ordinary income under Schedule C of Plaintiff's 1940 Income Tax return. She left the preparation of said returns to a reputable accounting firm and did not seek any [5] advice nor give any consideration to the question of how said percentage payments should be reported for tax purposes.

XI.

During the calendar year 1941 Plaintiff received as percentage payments from Whiting Corporation under the aforesaid contract \$37,231.68. In her Federal Income Tax return for said calendar year Plaintiff reported said payments as ordinary income. The tax shown as due per return was \$13,272.40. Said return was filed with the Collector of Internal Revenue for the Tenth District of Ohio. Payments by the Plaintiff in satisfaction of the liabilities shown per return and a small deficiency assessment based thereon were as follows:

<u>Date</u>	<u>Amount</u>
March 14, 1942	\$3,318.40
June 9, 1942	3,318.40
September 10, 1942	5,636.80
December 8, 1942	998.80
August 1, 1943	149.53

XII.

All of the aforesaid payments were paid to the Collector of the Tenth District of Ohio. At the time of each said payment Frazier Reams was the Collector of said District. He ceased to be Collector of said District on February 1, 1944 and has not at any time subsequent to said date been Collector of that or any other Federal Collection District.

XIII.

The aforesaid payments received by Plaintiff during 1941 under the percentage provisions of the aforesaid contract of May 31, 1940 with the Whiting Corporation constituted capital gain to Plaintiff realized upon the surrender of her stock in The Quickwork Company upon the complete liquidation of said corporation. The correct income tax liability of the Plaintiff for the year 1941 computed as [6] heretofore approved by the Bureau of Internal Revenue with the sole exception that said payments are treated as long term capital gain rather than ordinary income, was and is \$4,276.52. The total payments made by Plaintiff heretofore with respect to said year 1941 were \$13,421.93 and Plaintiff has overpaid her tax for said year by \$9,145.41.

XIV.

Pursuant to Provisions of Section 322 of the Internal Revenue Code, Plaintiff filed with the Collector for the Tenth District of Ohio, within the period allowed by law, a proper claim for refund in the amount of \$9,146.61 for refund of said overpayment. A true copy of said claim is attached hereto, marked Exhibit "B" and incorporated

herein by reference as if fully set forth herein. Under date of June 11, 1947 Plaintiff was advised by a written notice sent by registered mail by the Commissioner of Internal Revenue pursuant to Section 3772(a)(2) of the Internal Revenue Code that said claim for refund had been disallowed in full. No further action has been taken with respect to said claim since and no part of said overpayment has been refunded or credited to the Plaintiff.

SECOND CAUSE OF ACTION

For her Second Cause of Action Plaintiff alleges as follows:

I.

Plaintiff realleges Paragraphs I, II, III, IV, V, VI, VII, VIII, IX and X of her First Cause of Action herein as if fully set forth in this, her Second Cause of Action, in haec verba.

II.

During the calendar years 1942 and 1943 Plaintiff received as percentage payments from the Whiting Corporation under the aforesaid contract respectively \$65,808.26, and \$65,412.64. In her Federal Income Tax return for the calendar years 1942 and 1943 [7] Plaintiff reported said payments as ordinary income. The tax shown as due per said returns was respectively \$37,179.21 and \$9,038.45. Said return for the year 1942 was filed with the Collector of Internal Revenue for the Tenth District of Ohio and the return for the year 1943 was filed with the Collector of Internal Revenue for the Sixth Dis-

trict of California. Payments made by Plaintiff in satisfaction of the liability shown per said returns were as follows:

<u>Date</u>	<u>Amount</u>
February 19, 1943	\$ 9,294.82
June 12, 1943	9,294.80
September 13, 1943	8,294.80
December 11, 1943	10,294.81
March 15, 1944	4,519.24
December 28, 1944	4,519.21

Under the provisions of the Current Tax Payment Act of 1943 all of said payments were applied against Plaintiff's 1943 liability and the true tax liability of the Plaintiff for the year 1942 was and is discharged and the liability for said year and the year 1943 was and is accumulated as the liability for the year 1943.

III.

All of the payments set forth in Paragraph II above, up to and including the payment made on December 11, 1943 were paid to the Collector of the Tenth District of Ohio. At the time of all of said payments Frazier Reams was the Collector of said District. He ceased to be Collector of said District on February 1, 1944 and has not at any time subsequent to said date been Collector of that or any other Federal Collection District.

IV.

The aforesaid payments received by Plaintiff during 1942 and 1943 under the percentage provisions of the

herein by reference as if fully set forth herein. Under date of June 11, 1947 Plaintiff was advised by a written notice sent by registered mail by the Commissioner of Internal Revenue pursuant to Section 3772(a)(2) of the Internal Revenue Code that said claim for refund had been disallowed in full. No further action has been taken with respect to said claim since and no part of said overpayment has been refunded or credited to the Plaintiff.

SECOND CAUSE OF ACTION

For her Second Cause of Action Plaintiff alleges as follows:

I.

Plaintiff realleges Paragraphs I, II, III, IV, V, VI, VII, VIII, IX and X of her First Cause of Action herein as if fully set forth in this, her Second Cause of Action, in haec verba.

II.

During the calendar years 1942 and 1943 Plaintiff received as percentage payments from the Whiting Corporation under the aforesaid contract respectively \$65,808.26, and \$65,412.64. In her Federal Income Tax return for the calendar years 1942 and 1943 [7] Plaintiff reported said payments as ordinary income. The tax shown as due per said returns was respectively \$37,179.21 and \$9,038.45. Said return for the year 1942 was filed with the Collector of Internal Revenue for the Tenth District of Ohio and the return for the year 1943 was filed with the Collector of Internal Revenue for the Sixth Dis-

trict of California. Payments made by Plaintiff in satisfaction of the liability shown per said returns were as follows:

<u>Date</u>	<u>Amount</u>
February 19, 1943	\$ 9,294.82
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March 15, 1944	4,519.24
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Under the provisions of the Current Tax Payment Act of 1943 all of said payments were applied against Plaintiff's 1943 liability and the true tax liability of the Plaintiff for the year 1942 was and is discharged and the liability for said year and the year 1943 was and is accumulated as the liability for the year 1943.

III.

All of the payments set forth in Paragraph II above, up to and including the payment made on December 11, 1943 were paid to the Collector of the Tenth District of Ohio. At the time of all of said payments Frazier Reams was the Collector of said District. He ceased to be Collector of said District on February 1, 1944 and has not at any time subsequent to said date been Collector of that or any other Federal Collection District.

IV.

The aforesaid payments received by Plaintiff during 1942 and 1943 under the percentage provisions of the

aforesaid contract of May 31, 1940 with the Whiting Corporation constituted capital [8] gain to the Plaintiff realized upon the surrender of her stock in The Quickwork Company upon the complete liquidation of said corporation. The correct Income Tax liability of the Plaintiff for the year 1943 computed in accordance with the 1942 and 1943 returns previously filed with the sole exception that said payments are treated as long term capital gain rather than ordinary income was and is \$17,252.03. The total payments heretofore made by Plaintiff with respect to said year 1943 were \$46,216.88 and Plaintiff has overpaid her tax for said year by \$28,964.85.

V.

Pursuant to the provisions of Section 322 of the Internal Revenue Code Plaintiff filed with the Collector for the Sixth District of California within the period allowed by law a claim for refund of said overpayment of \$28,965.65. A true copy of said claim is attached hereto marked Exhibit "C" and incorporated herein by reference as if fully set forth herein. Under date of June 10, 1947 Plaintiff was advised by a written notice sent by registered mail by the Commissioner of Internal Revenue pursuant to Section 3772(a) (2) of the Internal Revenue Code that said claim for refund had been disallowed in full. No further action has been taken with respect to said claim since and no part of said overpayment has been refunded or credited to the Plaintiff.

THIRD CAUSE OF ACTION

For her Third Cause of Action Plaintiff alleges as follows:

I.

Plaintiff realleges Paragraphs I, II, III, IV, V, VI, VII, VIII, IX and X of her First Cause of Action herein, and Paragraphs II, III, IV and V of her Second Cause of Action herein, as if fully set forth in this her Third Cause of Action in haec verba. [9]

II.

The payments listed in Paragraph II hereinabove in Plaintiff's Second Cause of Action herein paid on March 15, 1944 and December 28, 1944 were paid to Defendant Harry C. Westover as Collector of the Sixth District of California. Said Defendant has continuously since the dates of said payments held and now occupies said position.

Wherefore, Plaintiff prays judgment:

(a) Against the Defendant, the United States of America, in the amount of \$28,068.61 plus interest as provided by law, and

(b) Against Defendant, Harry C. Westover, in the amount of \$9,038.45 plus interest as provided by law, and

(c) For her costs and disbursements herein and such other relief as the Court may deem meet and proper.

GIBSON, DUNN & CRUTCHER

By Bert A. Lewis

Attorneys for Plaintiff [10]

EXHIBIT "A"

AGREEMENT

This Agreement, Made and entered into this 31st day of May, A.D. 1940, by and between The Quickwork Company, a corporation organized and existing under and by virtue of the laws of the State of Ohio and authorized to transact business in the State of Illinois, hereinafter referred to as "Quickwork", party of the first part, and Whiting Corporation, a corporation organized and existing under and by virtue of the laws of the State of Illinois, hereinafter referred to as "Whiting", party of the second part, Witnesseth:

Whereas, Quickwork is engaged in the manufacture of Plate and Sheet Metal Workers Machinery and is desirous of selling substantially all of its assets, including the good will of the business heretofore carried on by it, the assets being more particularly hereinafter mentioned, to Whiting on the terms and conditions hereinafter mentioned; and

Whereas, Whiting is engaged in the business of manufacturing and selling various and sundry devices and machinery and is willing and desirous of purchasing said assets of Quickwork as a going business, subject to the terms and conditions hereinafter set forth:

Now, Therefore, in consideration of the premises and of the warranties hereinafter made and the mutual promises and agreements hereinafter entered into, It Is Agreed by and between the parties hereto as follows:

I. Quickwork hereby agrees to sell, assign, transfer and deliver to Whiting, and Whiting agrees to purchase from Quickwork on the closing date hereafter set forth, the following: [11]

- (a) All of the good will of the business now or heretofore carried on by Quickwork, including all business correspondence with customers, all furniture and office fixtures in the office in the Daily News Building in Chicago, Illinois.
- (b) All inventories of the products or parts thereof which are now in the custody of or owned by Quickwork, more particularly described in the list attached hereto and by reference thereto incorporated herein, said list being hereby identified as List No. "1".
- (c) All rights in the trade name "Quickwork" and to the business conducted by Quickwork.
- (d) All patents and applications for Letters Patents and trademarks, patterns jigs, tools, dies, fixtures, drawings and equipment which are applicable to or are used in connection with the manufacture or sale of Quickwork machinery.
- (e) Any and all royalties and other fee arrangement agreements heretofore entered into by Quickwork and all right, title and interest of Quickwork in the avails and proceeds of such agreements.
- (f) All unfilled orders or partially filled orders now in the hands of Quickwork for any of its products or parts thereof, which orders are more particularly described in the list attached hereto and by reference thereto incorporated herein, said list being hereby identified as List No. "2".

II. All of the property herein agreed to be sold shall be conveyed and transferred by proper Bills of Sale containing the usual warranties of title. Quickwork warrants that all of said property is and will be on the closing date

free and clear of all [12] liens, charges and encumbrances of every kind, character and description.

III. Whiting agrees that it will assume and perform all of Quickwork's unfilled contracts and orders as disclosed by the list heretofore identified as List No. "2". Quickwork will furnish to Whiting on the closing date executed originals or copies of all such unfilled contracts, if any, and all original unfilled sales orders.

IV. It is expressly understood and agreed that Whiting does not assume nor agree to pay, and shall not be obligated in any manner for any of the debts of Quickwork and that Whiting does not assume any of its contracts or obligations of any kind or character except only as herein expressly specified. This clause does not apply to commissions due or to become due to agents who have sold Quickwork products, or to existing advertising contracts or orders heretofore given to Kling Bros. for stock cutters which are undelivered at date of closing. A list of such commissions and advertising contracts and cutter orders is hereto attached, and it is agreed that these shall be assumed and paid by Whiting.

V. All other obligations and indebtedness of Quickwork shall be paid by it as soon after the date hereof as possible. Quickwork agrees to furnish to Whiting on the closing date a written statement under oath containing a full, accurate and complete list of its then creditors, their addresses and the amounts owing to each, or, if there be no creditors, a written statement under oath to that effect, and agrees to permit Whiting to withhold out of the sums herein agreed to be paid an amount of equal to the sum of its unpaid obligations. Whiting will either pay said obligationse or indebtedness of Quickwork to the extent of the amount remaining in its hands, but only upon

Quickwork's order so to do, or will retain the amount so withheld until [13] Quickwork, by a written statement under oath, certifies that all its obligations and indebtednesses are in fact paid, and thereupon Whiting will pay to Quickwork, upon demand in writing therefore by Quickwork, the amount then remaining in its hands.

VI. Quickwork agrees that Whiting, through its duly authorized representatives, may at any time enter upon the premises of Quickwork for the purpose of examining any of the objects which are subject to this Agreement. Whiting, through its duly authorized representatives, may also at any time examine any of the books of account, invoices, records and other papers of Quickwork insofar as they relate to the subject matters of this Contract, and make such extracts therefrom as it may desire.

VII. Quickwork further agrees that upon the consummation of said sale it will forthwith, or from time to time, upon demand by Whiting, execute or cause to be executed such other and further appropriate and reasonable instruments of transfer as may be required by Whiting for the purpose of carrying out the intentions and provisions of this Agreement.

VIII. It is further understood and agreed that Whiting plans to manufacture and sell tools and machines heretofore developed and sold by Quickwork; that it will advertise, promote and develop the manufacturing and sale thereof and use all diligent and reasonable efforts in connection therewith. Whiting further agrees that while this agreement is in force and effect it will not sell or offer for sale plate or sheet metal machinery of the kind or type other than that now manufactured by Quickwork, or any machinery in competition with that now manufactured by Quickwork. Whiting further agrees that should it make

any additions or changes or improvements in the line of machinery now purchased by it from Quickwork, or should it develop any machinery which does the same work as is now done by Quickwork, the sale of such machinery by Whiting shall be subject to the pro-[14] visions of Paragraph IX hereof, and ten per cent of the gross sales thereof shall be paid to Quickwork during the entire period of time in which this agreement is in effect. Commissions of Independent dealers not in excess of ten per cent (10%) may be deducted from gross sales.

IX. Whiting hereby agrees to pay to Quickwork as the consideration for all of the property described in Items "a" to "f" both inclusive, of Paragraph No. I of this Agreement, and as consideration of this Agreement, the following:

- (a) The sum of Fifteen Thousand (\$15,000) Dollars on the closing date hereinafter referred to.
- (b) Ten per cent (10%) of Whiting's gross sales price, less sales, use or occupational tax, F.O.B. Harvey, Illinois, on all machinery and equipment, including repair parts (less any of such machinery and equipment, if any, returned to Whiting through cancellation or repossession for non-payment) sold by Whiting after the closing date hereof, which machinery and equipment shall have been developed and manufactured by Whiting or upon its order, as a result of the acquiring by Whiting of the various articles hereinbefore referred to. Commissions of Independent Dealers not in excess of ten per cent (10%) may be deducted from gross sales.

- (c) Ten per cent (10%) of all royalties and other fees received by Whiting after the closing date hereof under and by virtue of the Agreements referred to in Item "e" of Paragraph No. I of this Agreement.
- (d) On all unfilled orders, including all orders in process of manufacture and undelivered order, Whiting shall pay to Quickwork fifty per cent (50%) of the net profit. In computing such net profit no factory or administra- [15] tive overhead shall be charged by Whiting.
- (e) The order from The E. L. Essley Machinery Company for Six Thousand Eight Hundred Four and 90/100 (\$6,804.90) Dollars and the order from Joseph T. Ryerson & Son Inc. for Fourteen Thousand Five Hundred (\$14,500.00) Dollars, less ten per cent (10%), now on hand are to come under the provisions of Clause "b" hereof and not under the provisions of Clause "d".

Whiting shall make its first accounting and payment to Quickwork for the period ending August 31, 1940, on or before September 21st, 1940, and shall make all further and subsequent accountings and payments to Quickwork for every three (3) months thereafter on or before the twenty-first day of the month following such three (3) months' period. All payments shall be made at the office of Whiting in Harvey, Illinois. Quickwork shall have the right at all reasonable times to examine the books of Whiting to determine the correctness of all payments due or to become due to it under this Agreement.

The ten per cent (10%) of the gross sales price, as set forth in Section IX (b) shall be paid to Quickwork or its

assignee quarterly during the entire lifetime of Agnes F. Smith, (who is the Vice-President of Quickwork). In the event of the death of said Agnes F. Smith prior to May 31, 1950, said percentage of the gross sales shall be paid by Whiting to the Estate of said Agnes F. Smith and shall continue from the date of her death to May 31, 1950; following this date Whiting shall not be obligated to pay. Nothing herein contained shall be construed in any way to limit the payment of ten per cent of the gross sales price to Agnes F. Smith during her entire lifetime.

Quickwork has reserved to itself and there is not included in the sale to Whiting the following: [16]

- (a) Cash on hand and in the bank
- (b) Accounts and notes receivable
- (c) All real property now owned by it
- (d) All property not now used by it in the manufacture or sale of Quickwork machinery.

X. It is mutually agreed that the closing date, for the closing and consummation of the sale herein provided for, shall be May 31, A.D. 1940.

XI. It is further understood and agreed that time is of the essence of this Contract and that the terms, provisions and conditions thereof shall be binding upon and inure to the use of the several parties hereto and their respective successors and assigns.

XII. Any and all controversies arising under or out of, or in connection with or relating to, or for the breach of, this Agreement, shall be settled by arbitration, in ac-

cordance with the rules then obtaining of the American Arbitration Association, and judgment upon any award rendered may be entered in any court, state or federal, having jurisdiction in the premises. The invalidity of this paragraph shall not affect the other Agreements herein set forth.

In Witness Whereof, the party of the first part has caused these presents to be executed by its Vice-President, attached by its Secretary and its Corporate Seal to be affixed hereto, and the party of the second part has caused these presents to be executed by its Vice-President, attested by its Secretary and its Corporate Seal to be hereto affixed the day and year first above written.

THE QUICKWORK COMPANY

By A. F. Smith,
Vice-President

Attest:

Margaret Gairoard,
Secretary [17]

WHITING CORPORATION

By R. E. Prussing,
Vice-President

Attest:

R. A. Pascoe,
Secretary [18]

EXHIBIT "B"

Form 843

Treasury Department
Internal Revenue Service
(Revised April 1940)

CLAIM

To Be Filed With the Collector Where Assessment Was
Made or Tax Paid

The Collector will indicate in the
block below the kind of claim filed, Collector's Stamp
and fill in the certificate on the re- (Date received)
verse side.

- ☐ Refund of Tax Illegally Collected.
- ☐ Refund of Amount Paid for Stamps
Unused, or Used in Error or Excess.
- ☐ Abatement of Tax Assessed (not ap-
plicable to estate or income taxes).

State of Ohio

County of Anglaize—ss:

_____ Name of taxpayer or
Type purchaser of stamps Agnes F. Smith
or Business Address.....
(Street) (City) (State)
Print Residence 123 S. Gunston Drive, Los Angeles
_____ 24, Calif.

The deponent, being duly sworn according to law, de-
poses and says that this statement is made on behalf of

the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed 10th Ohio
2. Period (if for income tax, make separate form for each taxable year) from Jan. 1, 1941, to Dec. 31, 1941
3. Character of assessment or tax Income tax [19]
4. Amount of assessment, \$13,423.13; dates of payment 3/14/42, 6/9/42, 8/2/42, 9/10/42 and 12/8/42
5. Date stamps were purchased from the Government
6. Amount to be refunded \$9,146.61
7. Amount to be abated (not applicable to income or estate taxes) \$.....
8. The time within which this claim may be legally filed expires, under Section 322(b)(1) I. R. C. on March 5, 1945. The deponent verily believes that this claim should be allowed for the following reasons:

See attached

(Attach letter-size sheets if space is not sufficient)

Sworn to and subscribed before me this 26 day of February, 1945

Signed Agnes F. Smith

.....

.....

(Title)

.....,
(Signature of officer administering oath)

(Claim was properly notarized but name of Notary is not now known.)

(See Instructions on Reverse Side)

AGNES F. SMITH

CLAIM FOR REFUND

For the Year Ended December 31, 1941

Pursuant to an agreement dated May 31, 1940 between the Quickwork Corporation located in Chicago, Illinois, of which the taxpayer was Vice-President, and the Whiting Corporation located in Chicago, Illinois, substantially all of the assets of Quickwork Corporation were sold to Whiting Corporation for cash and the right to receive 10% of the gross sales of Whiting Corporation for the taxpayer's lifetime or ten years certain.

Neither the Quickwork Corporation nor the taxpayer retained any interest whatsoever in the tangible assets, goodwill, patents, trade name, etc. transferred to the Whiting Corporation.

Upon dissolution of the Quickwork Corporation, on August 24, 1940, the taxpayer received, as payment for her stock, cash, the remaining tangible assets and the right to receive 10% of the gross sales of the Whiting Corporation as mentioned in the first paragraph above.

It is contended that the monies received by the taxpayer are deferred payments on the assets sold to the Whiting Corporation and that they are in the nature of liquidating dividends to the taxpayer by virtue of the transfer of the right to her.

The stock of the Quickwork Corporation was acquired by the taxpayer in 1933. Upon liquidation of the corporation the cost of her stock was fully recovered. Accordingly, the entire amount received during the taxable year was a long-term capital gain.

The following supporting authorities are cited: U. S. v. Dorothy D. Yerger (D. C. Penna.; 1944), 55 F. Supp. 521; and Imperial Type Metal Co. v. Commissioner (C. C. A.-3), 106 F. (2d) 302, 23 A. F. T. R. 347. [21]

A recomputation of the tax based on the contention of the Taxpayer is as follows:

(Continued)—1.

AGNES F. SMITH

CLAIM FOR REFUND

For the Year Ended December 31, 1941

Net income, per Revenue Agent's Report.....	\$37,676.16
Less—Reduction in income due to payments from the Whiting Corporation being included as a long-term capital gain instead of as a royalty	18,615.84
Adjusted taxable income.....	\$19,060.32
Less—Personal exemption.....	1,500.00
Surtax net income.....	\$17,560.32
Less—Earned income credit.....	300.00
Normal tax net income.....	\$17,260.32
Normal tax	\$ 690.41
Surtax	3,586.11
Total.....	\$ 4,276.52
Tax previously assessed.....	13,423.13
Overassessment	\$ 9,146.61

(Concluded)—2. [22]

EXHIBIT "C"

Form 843

Treasury Department
Internal Revenue Service
(Revised April 1940)

CLAIM

To Be Filed With the Collector Where Assessment Was
Made or Tax Paid

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

.....
Collector's Stamp
(Date received)

- ☐ Refund of Tax Illegally Collected
- ☐ Refund of Amount Paid for Stamps
Unused, or Used in Error or Excess.
- ☐ Abatement of Tax Assessed (not applicable to estate or income taxes).

State of California

County of Los Angeles—ss:

_____ Name of taxpayer or
Type purchaser of stamps Agnes F. Smith
or Business address
Print Residence 123 S. Gunston Drive, Los Angeles
_____ 24, Calif.

(Street) (City) (State)

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of

the taxpayer named and that the facts given below are true and complete:

1. District in which return (if any) was filed 6th Calif.
2. Period (if for income tax, make separate form for each taxable year) from Jan. 1, 1943, to Dec. 31, 1943.
3. Character of assessment or tax Income
4. Amount of assessment, \$46,217.68; dates of payment [23] 2/19/43, 6/12/43, 9/13/43, 12/11/43, 3/15/44 & 12/28/44
5. Date stamps were purchased from the Govern-
6. Amount to be refunded \$28,965.65
7. Amount to be abated (not applicable to income or estate taxes) \$.....
8. The time within which this claim may be legally filed expires, under Section 322(b)(1) I. R. C. on March 15, 1947. The deponent verily believes that this claim should be allowed for the following reasons:

See attached

(Attach letter-size sheets if space is not sufficient)

Sworn to and subscribed before me this 26 day of February, 1945

Signed Agnes F. Smith
.....
.....

(Title)

.....,
(Signature of officer administering oath)

(Claim was properly notarized but name of Notary is not now known.)

(See Instructions on Reverse Side)

AGNES F. SMITH
CLAIM FOR REFUND

For the Year Ended December 31, 1943

Pursuant to an agreement dated May 31, 1940 between the Quickwork Corporation located in Chicago, Illinois, of which the taxpayer was Vice-President, and the Whiting Corporation located in Chicago, Illinois, substantially all of the assets of Quickwork Corporation were sold to Whiting Corporation for cash and the right to receive 10% of the gross sales of Whiting Corporation for the taxpayer's lifetime or ten years certain.

Neither the Quickwork Corporation nor the taxpayer retained any interest whatsoever in the tangible assets, goodwill, patents, trade name, etc. transferred to the Whiting Corporation.

Upon dissolution of the Quickwork Corporation, on August 24, 1940, the taxpayer received, as payment for her stock, cash, the remaining tangible assets and the right to receive 10% of the gross sales of the Whiting Corporation as mentioned in the first paragraph above.

It is contended that the monies received by the taxpayer are deferred payments on the assets sold to the Whiting Corporation and that they are in the nature of liquidating dividends to the taxpayer by virtue of the transfer of the right to her.

The stock of the Quickwork Corporation was acquired by the taxpayer in 1933. Upon liquidation of the corporation the cost of her stock was fully recovered. Accordingly, the entire amount received during the taxable year was a long-term capital gain.

The following supporting authorities are cited: U. S. v. Dorothy D. Yerger (D. C. Penna., 1944), 55 F. Supp.

521; and Imperial Type Metal Co. v. Commissioner (C. C. A.-3), 106 F. (2d) 302, 23 A. F. T. R. 347.

A recomputation of the tax based on the contention of the [25] taxpayer is as follows:

AGNES F. SMITH
CLAIM FOR REFUND

For the Year Ended December 31, 1943

Net income, per 1942 return.....	\$65,886.27	
Less—Reduction in income due to payments from the Whiting Corporation being in- cluded as a long-term capital gain instead of a royalty.....	32,904.13	
Adjusted net income.....	\$32,982.14	
Less:		
Personal exemption.....	\$ 500.00	
Credit for dependents.....	350.00	850.00
Surtax net income.....	\$32,132.14	
Less—Earned income credit.....	300.00	
Normal tax net income.....	\$31,832.14	
Normal tax	\$ 1,909.93	
Surtax	12,396.64	
Total.....	\$14,306.57	

	Income Tax	Victory Tax
1. Net income, per 1943 return	\$61,906.07	\$65,398.64
2. Less—Reduction in income due to payments from the		

Whiting Corporation being included as a long-term capital gain instead of a royalty.....		32,706.32	65,412.65
		<u>\$29,199.75</u>	<u>\$ 14.01</u>
3. Less—Personal exemption....	1,200.00		
4. Surtax net income.....	\$27,999.75		
5. Less—Earned income credit	300.00		
6. Normal tax net income.....	<u>\$27,699.75</u>		
7. Normal tax	\$ 1,661.99		
8. Surtax	10,119.86	[26]	
9. Victory tax.....	None		
10. Total.....	<u>\$11,781.85</u>		
11. Income tax for 1942.....	<u>\$14,306.57</u>		
12. Larger of Lines 10 and 11....	\$14,306.57		
13. Smaller of Lines 10 and 11.....	\$11,781.85		
14. 75% of Line 13	8,836.39		
Unforgiven part of tax.....	<u>2,945.46</u>		
Total income and victory tax	\$17,252.03		
Tax previously assesses.....	<u>46,217.68</u>		
Overassessment	<u>\$28,965.65</u>		
			[27]

[Verified.]

[Endorsed]: Filed Aug. 11, 1947. Edmund L. Smith,
Clerk. [28]

[Title of District Court and Cause]

ANSWER TO PLAINTIFF'S COMPLAINT

Comes now the defendants, Harry C. Westover, Collector of Internal Revenue, Sixth District of California, and the United States of America, by their attorney, James M. Carter, United States Attorney in and for the Southern District of California, and for an answer to plaintiff's complaint herein, admit, deny and allege as follows:

FIRST CAUSE OF ACTION

I.

The allegations in paragraph I are admitted.

II.

The allegations in paragraph II are admitted.

III.

The allegations in paragraph III are admitted. [30]

IV.

The allegations in paragraph IV are admitted.

V.

Answering paragraph V, defendants allege they are without knowledge or information sufficient to form a belief as to the truth of the allegations therein set forth.

VI.

The allegations in paragraph VI are admitted.

VII.

The allegations in paragraph VII are admitted.

VIII.

The allegations in paragraph VIII are admitted.

IX.

The allegations in paragraph IX are admitted.

X.

The allegations in paragraph X are admitted except that defendants allege they are without knowledge or information sufficient to form a belief as to the truth of the allegation that plaintiff left the preparation of her returns entirely to the accounting firm and did not seek other advice or give other consideration to the question of how said percentage payments should be reported for tax purposes.

XI.

The allegations in paragraph XI are admitted except as to the dates and payments therein set forth. The defendants allege that the payments were made on the following dates:

March 18, 1942.....	\$3,318.40
June 20, 1942.....	\$3,318.40
September 19, 1942.....	\$5,638.00
December 12, 1942.....	\$ 998.80
August 18, 1942.....	\$ 152.89

XII.

The allegations in paragraph XII are admitted. [31]

XIII.

Answering paragraph XIII, defendants allege that the total payments by plaintiff for the year 1941 aggregated \$13,426.49, instead of the amount alleged. Defendants deny each and every material allegation in paragraph XIII.

XIV.

Answering paragraph XIV, defendants admit that plaintiff filed a claim for refund with the Collector for the Tenth District of Ohio, within the period allowed by law and that a true copy of said claim is attached to the complaint as Exhibit B. Defendants deny that said claim

was a proper claim for refund and deny the correctness and truth of the averments contained and set forth therein and the contentions advanced in said claim. Defendants deny there has been any overpayment of taxes by plaintiff as alleged. Defendants admit that the claim for refund was rejected on June 11, 1947, as alleged.

SECOND CAUSE OF ACTION

I.

For an answer to paragraph I, defendants repeat the allegations of their answer to paragraphs I to X, inclusive, of the plaintiff's First Cause of Action as if fully set forth in this paragraph of answer and thereby repeat the same allegations as an answer to paragraph I of the Second Cause of Action.

II.

The allegations of paragraph II are admitted.

III.

The allegations of paragraph III are admitted.

IV.

Answering paragraph IV, defendants allege that the aggregate payments made by plaintiff with respect to the year 1943, were \$46,217.68 instead of \$46,216.88, as alleged. The remaining allegations in paragraph IV are denied. [32]

V.

Answering paragraph V, defendants admit that plaintiff filed a claim for refund with the Collector for the Tenth District of Ohio, within the period allowed by law and that a true copy of said claim is attached to the complaint as Exhibit C. Defendants deny that said claim was a proper claim for refund and deny the correctness and truth of the averments contained and set forth therein and the contentions advanced in said claim. Defendants deny

there has been any overpayment of taxes by plaintiff as alleged. Defendants admit that the claim for refund was rejected on June 10, 1947, as alleged.

THIRD CAUSE OF ACTION

I.

For an answer to paragraph I, defendants repeat the allegations of their answer to paragraphs I to X, inclusive, of plaintiff's First Cause of Action herein and paragraphs II to V, inclusive of plaintiff's Second Cause of Action herein as if fully set forth in this paragraph of answer and makes the same allegations as an answer to paragraph I of plaintiff's Third Cause of Action.

II.

The allegations in paragraph II are admitted.

Further answering the complaint, the defendants deny that plaintiff is entitled to recover anything against these defendants or either of them.

Wherefore, defendants pray that the complaint be dismissed with costs and for all just and proper relief.

JAMES M. CARTER

United States Attorney

E. H. MITCHELL and

GEORGE M. BRYANT

Assistant U. S. Attorneys

EUGENE HARPOLE

Special Attorney

Bureau of Internal Revenue

By George M. Bryant

Attorneys for Defendants [33]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Oct. 21, 1947. Edmund L. Smith,
Clerk. [34]

[Title of District Court and Cause]

STIPULATION TO TAKE CASE OFF PRE-TRIAL
HEARING CALENDAR AND TO SET CASE
FOR HEARING ON MOTION FOR SUMMARY
JUDGMENT

It Is Hereby Stipulated and Agreed by and between counsel for Agnes F. Smith, plaintiff, and Harry C. Westover, United States Collector of Internal Revenue, Sixth District of California, and United States of America, defendants, that, subject to the approval of the Court, the above case may be removed from and stricken off the pre-trial hearing calendar set for December 8, 1947, and that the above case may be set for hearing at 10:00 a.m. on Monday, January 5, 1948, (or any other date agreeable to the Court), before the Honorable William C. Mathes, United States District Judge upon plaintiff's Motion for Summary Judgment in accordance with Rule 56 of the Federal Rules of Civil Procedure. This Stipulation is submitted since a hearing on said Motion for Summary Judgment may render unnecessary the pretrial hearing which would otherwise [35] be required herein. Prior to the hearing on the Motion for Summary Judgment, counsel for the defendants need to obtain further instructions from the Attorney General of the United States, and the setting of the hearing on the Motion for Summary Judgment on the above date of January 5, 1948, would furnish adequate time for the foregoing purposes.

Dated: This 2nd day of December, 1947.

GIBSON, DUNN & CRUTCHER

By Bert A. Lewis,

Attorneys for Plaintiff

JAMES M. CARTER

United States Attorney

E. H. MITCHELL and

GEORGE M. BRYANT

Assistant United States
Attorneys

EUGENE HARPOLE and

LOREN P. OAKES

Special Attorneys

Bureau of Internal Revenue

By Eugene Harpole

Attorneys for Defendants

ORDER

Pursuant to the Foregoing Stipulation it is hereby Ordered on the 4 day of December, 1947, that the above case be removed from and stricken off the foregoing pre-trial calendar set for December 8, 1947, and it is further ordered that the above Motion by plaintiff for Summary Judgment be set for hearing as above set forth on January 12, 1948, at 10:00 a.m.

WILLIAM C. MATHES

United States District Judge

[Endorsed]: Filed Dec. 4, 1947. Edmund L. Smith,
Clerk, [36]

[Title of District Court and Cause]

PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT

Now Comes Agnes F. Smith, plaintiff, by Bert A. Lewis, her attorney, and moves the court to enter judgment for the plaintiff for the relief demanded in her affidavit hereto attached, in accordance with Rule 56 of the Federal Rules of Civil Procedure,

GIBSON, DUNN & CRUTCHER

By Bert A. Lewis

Attorneys for Plaintiff

[Endorsed]: Filed Dec. 31, 1947. Edmund L. Smith,
Clerk. [40]

[Title of District Court and Cause]

AFFIDAVIT IN SUPPORT OF PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT

State of California

County of Los Angeles—ss.

Agnes F. Smith, being first duly sworn, deposes and says:

1. She is the plaintiff in the above entitled action.
2. Said action is brought by her to recover overpayments of Federal Income Taxes for the years 1941 and 1943 which resulted from her treating certain payments received by her under a contract with the Whiting Corporation erroneously as ordinary income whereas they should have been reported as capital gain. In 1940 The

Quickwork Company, a corporation controlled by the plaintiff, sold practically all of its assets to said Whiting Corporation for various considerations, including a promise of the Whiting Corporation to pay to the [41] seller, The Quickwork Company, 10% of the gross sales price to the Whiting Corporation on certain sales thereafter made by it. Subsequent to this transfer The Quickwork Company completely liquidated and dissolved and plaintiff received as a part of the assets in exchange for her stock the percentage contract against the Whiting Corporation. The present suit involves the tax character of payments thereafter received by plaintiff with respect to said contract.

3. In paragraph V of her Complaint herein plaintiff alleged as follows:

“The contract of sale between the Quickwork Company and the Whiting Corporation was an arms-length transaction in which each party was interested in making the best bargain possible. The Directors and stockholders of the Whiting Corporation were not related or interested in any way in The Quickwork Company nor was The Quickwork Company, its stockholders, or directors interested or related in any way to the Whiting Corporation. Plaintiff as the controlling officer and stockholder of The Quickwork Company attempted to secure the best bargain possible for that Company and in connection with such negotiations did not solicit nor receive any advice concerning the tax consequences to The Quickwork Company or herself of the various counter proposals made during said negotiations or the agree-

ment as finally executed. For many years prior to said sale the annual sales of The Quickwork Company had been substantial and both parties to said agreement realized that the impending War would be likely to increase considerably the demand for and sales of The Quickwork line."

Each allegation and statement of fact in said paragraph is [42] true and correct and is within the personal knowledge of plaintiff.

4. In Paragraph X of her Complaint filed herein plaintiff alleged that she left the preparation of her income tax returns for the years 1940 and subsequent years to a reputable accounting firm and did not seek any legal advice on the question of the proper allocation of the percentage payments received under the Whiting Corporation contract between principal and income for tax purposes. Said allegation was and is true and was and is within the personal knowledge of the plaintiff.

5. In their Answer to plaintiff's Complaint herein each of the defendants has admitted every allegation of fact contained therein (with minor but inconsequential variance in certain figures) except they have alleged that they are without knowledge or information sufficient to form a belief as to the truth of the allegations therein set forth in paragraph V of said Complaint and that part of the allegations of paragraph X referred to in the immediately preceding paragraph of this Affidavit.

6. The resolution of The Quickwork Company authorizing the transfer of all of its assets to plaintiff in complete liquidation of her stock therein was validly adopted by it on August 23, 1940, and a true and correct copy of said resolution is attached hereto as "Exhibit A." Pursu-

ant to said resolution, on August 24, 1940 The Quickwork Company transferred to plaintiff all of its assets of whatsoever nature except its real estate, by a bill of sale and assignment, a true and correct copy of which is attached hereto as "Exhibit B." The real estate was deeded to plaintiff on or about said date by a separate deed and plaintiff thereupon surrendered all of her stock in The Quickwork Company for cancellation and retirement.

7. At no time prior to the distribution mentioned in the preceding paragraph of this Affidavit did The Quickwork Company make any distribution in liquidation, partial or otherwise, with [43] respect to its stock; there was no intention or plan to liquidate until the principal assets of the Company were transferred to the Whiting Corporation pursuant to the contract of May 31, 1940, as alleged in paragraph IV of the Complaint herein. The only liquidation made thereafter was the final and complete liquidation effected as set forth in the preceding paragraph of this Affidavit.

8. Plaintiff verily believes that there is no genuine issue as to any material fact in this case and that plaintiff is entitled to judgment as a matter of law against each of the defendants as prayed in her Complaint herein.

AGNES F. SMITH

Subscribed and sworn to before me this 31st day of December, 1947.

(Seal)

C. E. CULVER,

Notary in and for the County of Los Angeles,
State of California.

My Commission Expires June 29, 1950. [44]

EXHIBIT A
LIQUIDATING RESOLUTION OF
THE QUICKWORK COMPANY

Resolved: That the President and Secretary of the Company execute such documents of assignment and conveyance as may be necessary to transfer to Agnes F. Smith, the sole shareholder of the Company, all of the real and personal property of the Company as a liquidating dividend on her shares of stock, said property to include specifically the following:

1. Cash on hand and in banks.
2. All accounts receivable, including advances to officers.
3. Any and all claims due or that may accrue in the future from the Whiting Corporation under agreement between The Quickwork Company and the Whiting Corporation, dated May 31, 1940; and for repossessed machines consigned by The Quickwork Company to the Whiting Corporation, having a book value of \$4230.00; and the sum of \$3145.70 due from the Whiting Corporation, being in excess of charges for inventory, patterns (net), patents, experimental machines, etc., amounting to \$18,145.70 less cash collected of \$15,000.00 from Whiting Corporation in accordance with the terms of said agreement dated May 31, 1940.
4. Office furniture and fixtures having a book value of \$50.00.
5. \$140.00 deposit on new Mercury automobile with Wright Motors, Inc., 1822 Ridge Ave., Evanston, Illinois.
6. Insurance policy No. 964825, issued by the New England Mutual Life Insurance Company on the

ant to said resolution, on August 24, 1940 The Quickwork Company transferred to plaintiff all of its assets of whatsoever nature except its real estate, by a bill of sale and assignment, a true and correct copy of which is attached hereto as "Exhibit B." The real estate was deeded to plaintiff on or about said date by a separate deed and plaintiff thereupon surrendered all of her stock in The Quickwork Company for cancellation and retirement.

7. At no time prior to the distribution mentioned in the preceding paragraph of this Affidavit did The Quickwork Company make any distribution in liquidation, partial or otherwise, with [43] respect to its stock; there was no intention or plan to liquidate until the principal assets of the Company were transferred to the Whiting Corporation pursuant to the contract of May 31, 1940, as alleged in paragraph IV of the Complaint herein. The only liquidation made thereafter was the final and complete liquidation effected as set forth in the preceding paragraph of this Affidavit.

8. Plaintiff verily believes that there is no genuine issue as to any material fact in this case and that plaintiff is entitled to judgment as a matter of law against each of the defendants as prayed in her Complaint herein.

AGNES F. SMITH

Subscribed and sworn to before me this 31st day of December, 1947.

(Seal)

C. E. CULVER,

Notary in and for the County of Los Angeles,
State of California.

My Commission Expires June 29, 1950. [44]

EXHIBIT A
LIQUIDATING RESOLUTION OF
THE QUICKWORK COMPANY

Resolved: That the President and Secretary of the Company execute such documents of assignment and conveyance as may be necessary to transfer to Agnes F. Smith, the sole shareholder of the Company, all of the real and personal property of the Company as a liquidating dividend on her shares of stock, said property to include specifically the following:

1. Cash on hand and in banks.
2. All accounts receivable, including advances to officers.
3. Any and all claims due or that may accrue in the future from the Whiting Corporation under agreement between The Quickwork Company and the Whiting Corporation, dated May 31, 1940; and for repossessed machines consigned by The Quickwork Company to the Whiting Corporation, having a book value of \$4230.00; and the sum of \$3145.70 due from the Whiting Corporation, being in excess of charges for inventory, patterns (net), patents, experimental machines, etc., amounting to \$18,145.70 less cash collected of \$15,000.00 from Whiting Corporation in accordance with the terms of said agreement dated May 31, 1940.
4. Office furniture and fixtures having a book value of \$50.00.
5. \$140.00 deposit on new Mercury automobile with Wright Motors, Inc., 1822 Ridge Ave., Evanston, Illinois.
6. Insurance policy No. 964825, issued by the New England Mutual Life Insurance Company on the

life of H. Collier Smith, Jr., with The Quickwork Company as beneficiary, including the prepaid insurance premium thereon, having a book value as of June 30, 1940, of to wit: \$501.79 and including the dividends left with the company having [45] a book value as of June 30, 1940, of to wit: \$112.78.

7. Real estate of the Company in Auglaize County, St. Mary's Township, Ohio. [46]

EXHIBIT B

BILL OF SALE AND ASSIGNMENT

For and in consideration of the sum of \$10.00 and other good and valuable consideration, receipt of which is hereby acknowledged, and as a liquidating dividend on those shares of stock of The Quickwork Company, owned and held by Agnes F. Smith, and pursuant to resolution of the Shareholders and Board of Directors of The Quickwork Company duly passed and adopted in accordance with the by-laws and regulations of the said company and the laws of Ohio, the undersigned, The Quickwork Company, does hereby sell, assign, transfer, deliver, set over and convey to Agnes F. Smith the following described items of personal property now owned by and standing in the name of The Quickwork Company:

1. Cash on hand and in banks.
2. All accounts receivable, including advances to officers.
3. Any and all claims due or that may accrue in the future from the Whiting Corporation under agreement between The Quickwork Company and the Whiting Corporation, dated May 31, 1940; and for repossessed machines consigned by The Quickwork Company to the Whiting Corporation, having a book value of \$4230.00; and the sum of \$3145.70

due from the Whiting Corporation, being in excess of charges for inventory, patterns (net), patents, experimental machines, etc., amounting to \$18,145.70 less cash collected of \$15,000.00 from Whiting Corporation in accordance with the terms of said agreement dated May 31, 1940.

4. Office furniture and fixtures having a book value of \$50.00.
5. \$140.00 deposit on new Mercury automobile with Wright Motors, Inc., 1822 Ridge Ave., Evanston, Illinois.
6. Insurance policy No. 964825, issued by the New [47] England Mutual Life Insurance Company on the life of H. Collier Smith, Jr., with The Quickwork Company as beneficiary, including the prepaid insurance premium thereon, having a book value as of June 30, 1940, of to wit: \$501.79 and including the dividends left with the company having a book value as of June 30, 1940, of to wit: \$112.78.

In Witness Whereof, The Quickwork Company has caused these presents to be signed by its President and attested by its Secretary, this 24th day of August, 1940.

THE QUICKWORK COMPANY

(Signed) H. Collier Smith, Jr.

Attested:

Its President

Jalth T. Scott,

Its Secretary [48]

* * * * *

Received copy of the within Notice this 31 day of December, 1947. James M. Carter, U. S. Atty.; by Gertrude M. Johnson, Attorneys for Defts.

[Endorsed]: Filed Dec. 31, 1947. Edmund L. Smith, Clerk. [59]

[Title of District Court and Cause]

MOTION BY DEFENDANTS TO TAKE OFF THE
CALENDAR PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT SET FOR HEARING
ON JANUARY 12, 1948, AND IN THE
ALTERNATIVE, COUNTER-MOTION BY DE-
FENDANTS FOR SUMMARY JUDGMENT

Come now the defendants, Harry C. Westover, Collector of Internal Revenue, Sixth District of California, and the United States of America, by their attorneys above named, and move the Court for reasons hereinafter stated to take off the calendar plaintiff's motion for summary judgment set for hearing on January 12, 1948, and in the alternative the foregoing defendants move the Court by way of counter-motion for a summary judgment in their favor under Rule 56 of the Federal Rules of Civil Procedure. In support of the foregoing motion and counter-motion, the following is stated and shown:

1. On December 4, 1947, pursuant to stipulation by the parties hereto, this Court set January 12, 1948, as the date for hearing of a motion by plaintiff for summary judgment. The foregoing motion by plaintiff, together with supporting and related papers have been served upon the defendants. In such supporting papers plaintiff quotes at great length from the case of Susan J. Carter, 9 T. C. No. 54, promulgated September 17, 1947. Plaintiff places her principal [60] reliance on the Carter case and states the Tax Court decided the issue here involved ". . . on facts very similar to those involved in the instant case".

2. Subsequent to the above date of December 4, 1947, it has been ascertained that the Chief Counsel for the Bureau of Internal Revenue approved a recommendation that the Commissioner of Internal Revenue nonacquiesce in the above Carter decision and that such case be appealed from the Tax Court to the Second Circuit Court of Appeals. It is most likely that the Department of Justice will likewise concur in the foregoing recommendation and promptly prosecute an appeal to the Second Circuit with respect to the above Carter decision.

3. Defendants represent that the facts in the Carter case are stronger in favor of the taxpayer than are the facts here involved in favor of the instant taxpayer. Under these circumstances it would necessarily follow that if the Second Circuit decides the proposed Carter appeal in the Government's favor, the issues raised by the instant plaintiff's motion for summary judgment should a fortiori be decided in favor of the above defendants. In the interest of conserving the time of both the Court and counsel, the motion by plaintiff for summary judgment should be taken off calendar or otherwise held in abeyance pending a decision by the Second Circuit on the proposed Carter appeal involving facts conceded by plaintiff to be very similar to those here involved.

4. If the foregoing motion to take plaintiff's motion off calendar is not granted, the above defendants request the Court to grant the counter-motion above mentioned. It is understood that plaintiff will endeavor to present at the hearing of her above motion on January 12, 1948, all

the material facts herein. If all material facts are presented, defendants submit that such facts will support a motion for summary judgment in favor of defendants rather than a motion for such judgment in favor of the plaintiff.

5. Under Rule 3 of the Local Rules of this Court, defendants will be required to serve a statement of reasons in opposition to plaintiff's above motion and an answering memorandum of points and authorities and file such statement and answering memorandum and it is requested that the foregoing statement and memorandum be considered to also serve the purpose of constituting [61] the statement of reasons in support of the above counter-motion and the memorandum of points and authorities supporting such counter-motion.

Dated: December 31, 1947.

JAMES M. CARTER
United States Attorney

E. H. MITCHELL and
GEORGE M. BRYANT
Assistant United States
Attorneys

EUGENE HARPOLE and
LOREN P. OAKES
Special Attorneys
Bureau of Internal Revenue
By Loren P. Oakes
Attorneys for Defendants. [62]

[Affidavit of Service by Mail]

[Endorsed]: Filed Dec. 31, 1947. Edmund L. Smith,
Clerk. [63]

[Title of District Court and Cause]

ORDER DENYING DEFENDANTS' MOTION TO
TAKE PLAINTIFF'S MOTION FOR SUM-
MARY JUDGMENT OFF CALENDAR

The above named case coming on this 12th day of January, 1948 to be heard on motion of Plaintiff for Summary Judgment and on motion of defendants to take Plaintiff's Motion off calendar and in the alternative for Summary Judgment, and Counsel being heard for the respective parties;

It Is Hereby Ordered That:

Defendants' Motion to take off calendar Plaintiff's Motion for Summary Judgment be, and the same hereby is overruled and denied.

WM. C. MATHES,
United States District Judge

The above Order approved as to form this 22 day of January, 1948. James M. Carter, United States Attorney; E. H. Mitchell and George M. Bryant, Asst. U. S. Attys.; Eugene Harpole, Special Atty. Bureau of Internal Revenue; by Eugene Harpole.

[Endorsed]: Filed Jan. 26, 1948. Edmund L. Smith, Clerk. [106]

[Title of District Court and Cause]

ORDER ON MOTIONS FOR SUMMARY
JUDGMENT

This cause having heretofore come before the court for hearing on the motion of plaintiff for summary judgment and the motion of defendants for summary judgment; and the motions having been heard and submitted for decision; and it appearing to the court:

(a) that there is no genuine issue as to any material fact involved in this cause;

(b) that the facts alleged in plaintiff's complaint are true;

(c) that no reason appears which would warrant the court in disregarding the separate corporate entity of Quickwork Company in determining the income tax liability of plaintiff in [142] controversy [Moline Properties Inc. v. Commissioner, 319 U. S. 436 (1943); Rogan v. Starr Piano Co., 139 F. (2d) 671 (C. C. A. 9th, 1943)];

(d) that the Whiting Corporation contract was received by plaintiff in exchange for plaintiff's stock [a capital asset] upon the liquidation of Quickwork Company in 1940, and the contract had no ascertainable fair market value at the time of the exchange [See I. R. C. § 111 (b)];

(e) that since the property [Whiting Corporation contract] received by plaintiff upon liquidation had no ascertainable fair market value, the transaction [liquidation of Quickwork] was not closed at the time of the exchange in 1940 [Burnet v. Logan, 283 U. S. 404 (1931); Commissioner of Internal Revenue v. Hopkinson, 126 F. (2d) 406 (C. C. A. 2d, 1942); United States v. Yerger, 55 Fed. Supp. 521 (E. D. Pa., 1944); Susan J. Carter, 9 T. C. 364 (1947)];

(f) that payments subsequently received by plaintiff under the Whiting Corporation contract, as alleged in the complaint, were accordingly "amounts distributed in complete liquidation" of the Quickwork Company within the meaning of I. R. C. § 115 (c), in exchange for capital assets [Quickwork stock] held by plaintiff for more than six months; hence such payments are taxable to plaintiff as "long term capital gain" pursuant to I. R. C. § 117 (a) (4) [Burnet v. Logan, *supra*, 283 U. S. 404 (1931); Susan J. Carter, *supra*, 9 T. C. 364 (1947)]; and

(g) that plaintiff is therefore entitled, as a matter of law, to judgment against defendants as [143] prayed for in the complaint;

It Is Now Ordered:

(1) that plaintiff's motion for summary judgment against defendants, as prayed for in the complaint, be and is hereby granted;

(2) that defendants' motion for summary judgment be and is hereby denied; and

(3) counsel for plaintiff are directed to submit judgment accordingly—and findings of fact and conclusions of law if so advised [See Rule 52 (a) F R. C. P., as amended March 19, 1948]—pursuant to local rule 7 within 10 days.

It Is Further Ordered that the Clerk this day forward copies of this order by United States mail to the attorneys for the parties appearing in this cause.

May 18, 1948.

WM. C. MATHES

United States District Judge

[Endorsed]: Filed May 18, 1948. Edmund L. Smith, Clerk. [144]

In the District Court of the United States
Southern District of California
Central Division
No. 7476-WM

AGNES F. SMITH,

Plaintiff,

vs.

HARRY C. WESTOVER, UNITED STATES
COLLECTOR OF INTERNAL REVENUE,
SIXTH DISTRICT OF CALIFORNIA, and
UNITED STATES OF AMERICA,

Defendants.

JUDGMENT

This cause having heretofore come before the court for hearing on the motion of plaintiff for summary judgment and the motion of defendants for summary judgment; and the motions having been heard and submitted for decision; and the court having heretofore entered its order on May 18, 1948, granting plaintiff's motion for summary judgment and denying defendants' motion for summary judgment:

It Is Hereby Ordered, Adjudged and Decreed that plaintiff do have and recover of and from the defendant, United States of America

(1) The sum of \$9,149.97 with respect to the tax year 1941 plus interest at the rate of six per cent per annum on the following amounts from the following

dates in accordance with the provisions of Section 177 of the [145] Judicial Code (28 U. S. C. A. Section 284): ~~and computed to the dates provided in said sections:~~ [Mathes, J.]

<u>Amounts</u>	<u>Interest from</u>
\$152.89	August 18, 1943
\$998.80	December 12, 1942
\$5,638.00	September 19, 1942
\$2,360.28	June 20, 1942

(2) The sum of \$19,927.20 with respect to the tax year 1943 plus interest at the rate of six per cent per annum on said amount from March 15, 1944, in accordance with the provisions of Section 177 of the Judicial Code (28 U. S. C. A. Section 284): ~~and computed to the dates provided in said section:~~ [Mathes, J.]

It Is Hereby Further Ordered, Adjudged and Decreed that plaintiff do have and recover of and from defendant, Harry C. Westover, the sum of \$9,038.45 with respect to the tax year 1943 plus interest at the rate of six per cent per annum on the following amounts from the following dates in accordance with the provisions of Section 177 of the Judicial Code (28 U. S. C. A. Section 284): ~~and computed to the dates provided in said section:~~ [Mathes, J.]

<u>Amounts</u>	<u>Interest from</u>
\$4,519.21	December 28, 1944
\$4,519.24	March 15, 1944

It Is Further Ordered, Adjudged and Decreed in accordance with Rule 54 (c) F. R. C. P., that Paragraph (a) of the prayer in plaintiff's complaint in this action be amended by striking therefrom the figures \$28,068.61 and inserting in lieu thereof the figures \$29,077.17, the latter figure being the correct figure [146] and being supported by the pleadings in this case.

Dated: May 28, 1948.

WM. C. MATHES

United States District Judge

The foregoing Judgment approved as to form: May 26, 1948. James M. Carter, United States Attorney; E. H. Mitchell and George M. Bryant, Assistant U. S. Attorneys; Eugene Harpole, Special Attorney Bureau of Internal Revenue; by George M. Bryant, Attorneys for Defendants.

Judgment entered May 28, 1948. Docketed May 28, 1948. C. O. Book 51, page 60. Edmund L. Smith, Clerk; by Louis J. Somers, Deputy.

[Endorsed]: Filed May 28, 1948. Edmund L. Smith, Clerk. [147]

[Title of District Court and Cause]

NOTICE OF APPEAL

Notice Is Hereby Given that Harry C. Westover, United States Collector of Internal Revenue, Sixth Collection District of California, and the United States of America, defendants herein, each hereby appeal to the Ninth Circuit Court of Appeals from the order denying defendants' motion for summary judgment and granting plaintiff's motion for summary judgment entered by this Court on May 18, 1948, and from the final judgment of this Court entered on May 28, 1948, in favor of the plaintiff and against both the defendants herein for the sum of \$37,107.96, plus interest.

Dated: July 13, 1948.

JAMES M. CARTER

United States Attorney

E. H. MITCHELL and

GEORGE M. BRYANT

Assistant United States

Attorneys

EUGENE HARPOLE,

Special Attorney

Bureau of Internal Revenue

By Eugene Harpole

Attorneys for Defendants

[Endorsed]: Filed & mld. copy to Gibson, Dunn & Crutcher Jul. 14, 1948. Edmund L. Smith, Clerk. [150]

[Title of District Court and Cause]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 152, inclusive, contain full, true and correct copies of Complaint to Recover Over-Payment of Federal Income Tax; Stipulation and Order For Extension of Time to Answer or Otherwise Plead; Answer to Plaintiff's Complaint; Stipulation and Order To Take Case Off Pre-Trial Hearing Calendar and to Set Case for Hearing on Motion for Summary Judgment; Order Extending Time; Notice of and Plaintiff's Motion for Summary Judgment with Affidavit, Exhibits and Points and Authorities in Support; Motion by Defendants to Take Off The Calendar Plaintiff's Motion for Summary Judgment and in the Alternative Counter-Motion by Defendants for Summary Judgment; Notice of Motion to Take Off Calendar etc.; Plaintiff's Memorandum of Reasons, Points and Authorities in Opposition to Defendants' Motion to Take Off Calendar Plaintiff's Motion for Summary Judgment; Written Statement of Reasons in Opposition to Plaintiff's Motion for Summary Judgment and Memorandum of Points and Authorities Answering Such Motion by Plaintiff and Also Supporting Countermotion by Defendants for Summary Judgment; Plaintiff's Reply Memorandum Concerning Her Motion for Summary Judgment; Plaintiff's Memorandum Concerning Question of Whether or Not Plaintiff Stands in the Shoes of her Corporation, the

Quick-Work Company, for the Purpose of Computing the Income Tax Resulting to her from the Liquidation of said Company; Order Denying Defendants' Motion to Take Plaintiff's Motion for Summary Judgment Off Calendar; Stipulation and Order re Briefs; Supplemental Brief for Defendants; Brief in Reply to Defendant's Supplemental Brief; Order on Motion for Summary Judgment; Judgment; Certificate of Probable Cause; Notice of Entry of Judgment; Notice of Appeal and Designation of Record on Appeal which constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

Witness my hand and the seal of said District Court this 9 day of August, A.D. 1948.

(Seal)

EDMUND L. SMITH

Clerk

By Theodore Hocke

Chief Deputy

[Endorsed]: No. 12019. United States Circuit Court of Appeals for the Ninth Circuit. Harry C. Westover, United States Collector of Internal Revenue, Sixth Collection District of California, and United States of America, Appellants, vs. Agnes F. Smith, Appellee. Transcript of Record. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed August 12, 1948.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 12019

HARRY C. WESTOVER, Collector of Internal Revenue
for the Sixth District of California, and UNITED
STATES OF AMERICA,

Appellants,

vs.

AGNES F. SMITH,

Appellee.

APPELLANTS' STATEMENT OF POINTS TO BE
RELIED UPON ON APPEAL

To: Agnes F. Smith and Gibson, Dunn & Crutcher, her
attorneys:

You and Each of You will please take notice under the provisions of subsection (6) of Rule 19 of the Rules of Practice of the United States Circuit Court of Appeals for the Ninth Circuit that the Appellants intend to rely upon the following points in their appeal in the above entitled case:

1. The District Court erred in granting appellee's motion for a summary judgment and in awarding judgment in favor of the appellee and against these appellants in the amount of \$37,107.96, plus interest.
2. The District Court erred in denying appellants' motion for a summary judgment.
3. The District Court erred in finding, holding and concluding that the pleadings, motions and affidavits established that payments received by appellee during the calendar years 1941 and 1943 from the Whiting Corporation pursuant to a contract between the Quickwork Corporation and the Whiting Cor-

poration which contract was assigned to appellee in 1940, under a dissolution of the Quickwork Corporation and in liquidation of said corporation and in exchange for stock in the Quickwork Corporation owned by the appellee, appellee being the sole stockholder of Quickwork Corporation, constitute capital gains under Section 117, Internal Revenue Code, as contended by the appellee rather than ordinary income under Section 22(a), Internal Revenue Code, as contended by appellants.

4. The pleadings, motions and affidavits in the record in the District Court establish that said payments were ordinary income to appellee and that the Commissioner consequently correctly treated such payments as ordinary income in the tax years involved rather than the proceeds derived from the sale or exchange of capital assets.

Dated: This 11th day of August, 1948.

JAMES M. CARTER—E.H.

United States Attorney

E. H. MITCHELL—E.H.

Assistant United States Attorney

GEORGE M. BRYANT—E.H.

Assistant United States Attorney

EUGENE HARPOLE

Special Attorney

Bureau of Internal Revenue

Attorneys for Appellants

Received copy of the within Appellants' Statement of Points to Be Relied Upon on Appeal this 11 day of August, 1948. By Bert A. Lewis, Attorneys for Appellee.

[Endorsed]: Filed Aug. 13, 1948. Paul P. O'Brien, Clerk.

